# INDEX



## CITATIONS





281509—40

# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 602

J. D. CHALK, COMMISSIONER, DIVISION OF GAME AND INLAND FISHERIES, DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA, ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The district court did not deliver an opinion. Its findings of fact, conclusions of law, and decree appear in the record at pages 67–74. The opinion of the circuit court of appeals (R. 311–318) is reported in 114 F. (2d) 207.

### JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered August 30, 1940

(R. 318). The petition for a writ of certiorari was filed November 30, 1940. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's finding that the Pisgah National Game Preserve is being severely damaged by the presence of an excessive number of deer.

2. Whether, notwithstanding state game laws to the contrary, the United States may protect a National Game Preserve by killing deer and by shipping live deer to other parts of the country.

3. Whether North Carolina has ceded to the Federal Government exclusive jurisdiction over the Pisgah Preserve with respect to the control of the deer in question.

## STATUTES INVOLVED

The pertinent provisions of North Carolina Laws 1915, c. 205, and of the Act of August 11, 1916, c. 313, 39 Stat. 446, 476, are set out in the Appendix, *infra,* pp. 10–12.

## STATEMENT

The United States brought this suit permanently to enjoin petitioners, officials of the State of North Carolina, from enforcing the state game laws against federal officers and other persons killing and trapping deer on the Pisgah National Game

Preserve pursuant to regulations of the Secretary of Agriculture (R. 48–50).

Under the Weeks Act of March 1, 1911, c. 186, 36 Stat. 961, and with the consent of the state,[1] the United States acquired 150,000 acres in western North Carolina for the Pisgah National Forest (R. 34, 53). In 1915 the state enacted a statute with respect to such lands to the effect that the United States might make "all such rules and regulations as the Federal Government shall determine to be needful in respect to game animals, game and non-game birds, and fish." N. C. Laws 1915, c. 205, N. C. Code Ann. (1939) sec. 2099, Appendix pp. 10–11, *infra*.

By the Act of August 11, 1916, c. 313, 39 Stat. 446, 476, 16 U. S. C., sec. 683, Appendix pp. 11–12, *infra*, Congress authorized the President "to designate such areas on any lands" acquired pursuant to the Weeks Act "as should, in his opinion, be set aside for the protection of game animals, birds or fish." The Act also prohibited hunting or killing wildlife in those areas "except under such general rules and regulations as the Secretary of Agriculture may from time to time prescribe." On October 17, 1916, the President issued a proclamation (39 Stat. 1811) setting aside about 96,000 acres within the Pisgah National Forest as the Pisgah National Game Preserve (R. 34, 53).

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[1] N. C. Laws 1901, c. 17 (N. C. Code Ann. (1939) sec. 8057).

Between 1916 and 1925 the number of deer on the Preserve increased from 1,200 to 2,500 (R. 96). Beginning in 1927 the Government endeavored to counteract this increase by trapping and shipping about 200 live deer from the Preserve each year (R. 41, 56). In spite of the Government's efforts the number of the deer increased to over 7,000 by 1935 (R. 125). The result was that the deer severely damaged the lands, forest, and vegetative cover by over-browsing, thus extinguishing some of the most palatable species, greatly reducing the quantity of other species, damaging valuable commercial trees, retarding the normal development of the forest, causing erosion and preventing existing erosion from healing (R. 67–68, 105, 118, 122, 251–257).

Beginning in 1935 federal officers, acting under regulations of the Secretary of Agriculture undertook to reduce the size of the deer herd by conducting annual hunts and by capturing and shipping live deer to other parts of the United States (R. 36–43; 53–57; 68–69). However, petitioners asserted jurisdiction over the hunting, trapping, and transportation of deer from the Preserve (R. 69). Federal officers were arrested and prosecuted under the claim that they were proceeding in violation of the state game laws (R. 41–42, 56).

Thereupon, the United States brought this suit. The District Court granted a permanent injunction finding, among other things (R. 67–68):

2. That the land, forest and vegetative cover comprising said [the Pisgah National Game] Preserve have been and are being severely damaged by the deer on said Preserve.

3. That on September 9, 1939, the Secretary of Agriculture made the following finding published in the Federal Register of September 12, 1939:

"I have considered the information and evidence adduced by the officers of the Forest Service relative to the conditions of the land and deer herd on the Pisgah National Game Preserve in the Pisgah National Forest in North Carolina, established by proclamation of the President issued October 17, 1916, 39 Stat. 1811, and I hereby find and determine that the number of deer within the Pisgah National Game Preserve is so great that they have caused and are causing serious damage and injury to the land and forest within the Pisgah National Game Preserve and I further find and determine that unless the deer herd is reduced the damage and injury to the land and forest will continue and grow progressively worse and will result in further reducing the forage capacity of the Pisgah National Game Preserve for deer;"

4. That the finding of the Secretary of Agriculture as set out in Finding of Fact No. 3 herein, is sustained by the evidence taken in open Court from a host of witnesses and as is fully set out in the record.

The Circuit Court of Appeals concurred in these findings, saying (R. 316):

> * * * a study of the evidence leads us to the conclusion that the judge below was clearly right in his finding of fact, that the land, forest and vegetative cover comprising said Game Preserve was being severely damaged by the deer herd. The evidence on behalf of the plaintiff on this question was much more persuasive than that offered on behalf of the defendants and the reasons given for the conclusions reached by the plaintiff's witnesses were much more convincing than those given by defendants' witnesses.

The decision of the district court was affirmed on the ground that the United States had the right to protect its property without interference from the State (relying upon *Hunt* v. *United States,* 278 U. S. 96), and also upon the ground that, in any event, North Carolina had ceded to the Federal Government exclusive jurisdiction over wildlife on the Pisgah National Game Preserve (R. 316–317).

## ARGUMENT

1. The Circuit Court of Appeals concurred in the trial court's finding that the Pisgah National Game Preserve is being severely damaged by an excessive number of deer (R. 67–68, 316). Petitioners seek to have that finding reviewed (Pet. 12, 18, 21–22). To prevail, petitioners must demonstrate that the finding is clearly wrong. They have not sustained

that burden; on the contrary they admit (Pet. 22) that two Government witnesses testified that the deer were causing substantial damage. And in any event the finding is fully supported by the evidence (R. 104–106, 118–122, 125, 251–257; see also p. 4, *supra*). Thus, it is clear that there is no basis for further review.

2. Nor is there doubt as to the correctness of the ruling (R. 316) that the Federal Government has the inherent power to protect its lands from such damage. *Hunt* v. *United States*, 278 U. S. 96, is directly in point. There the Grand Canyon National Game Preserve had been seriously injured by over-browsing. The Government attempted to reduce the size of the deer herd by killing large numbers of the deer and trapping and shipping live deer to other sections of the United States.[2] Arizona officials interfered claiming that state game laws were being violated. The United States obtained an injunction against the state officers and this Court affirmed, saying (p. 100):

> * * * the power of the United States to thus protect its lands and property does not admit of doubt, *Camfield* v. *United States*, 167 U. S. 518, 525–526; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404; *McKelvey* v. *United States*, 260 U. S. 353, 359; *United States* v. *Alford*, 274 U. S. 264, the game laws or any other statute of the state to the contrary notwithstanding.

[2] See Record, *Hunt* v. *United States*, No. 44, October Term, 1928, pp. 7, 125.

3. The court below further held that the injunction was proper because North Carolina has ceded to the United States exclusive jurisdiction over the control of the wildlife on the Pisgah Preserve (R. 317). Such a cession was clearly within the power of the state, *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 529–530, and the 1915 statute is susceptible of no other interpretation. N. C. Laws 1915, c. 205, N. C. Code Ann. (1939) sec. 2099, Appendix pp. 10–11, *infra*, Contrary to petitioners' contention (Pet. 15–16) it is obvious that the state Act of 1901 has no bearing on the question of whether the state ceded jurisdiction over the wildlife in 1915. Likewise the attempts by the state in 1933 and 1939 (Pet. 17–18) to abrogate or repeal the cession of jurisdiction do not amount to a legislative construction of the 1915 Act.

Petitioners further contend that even if the state did cede exclusive jurisdiction over the wildlife (Pet. 16) the Circuit Court of Appeals erred in holding (R. 314–315) that the Act of August 11, 1916, c. 313, 39 Stat. 446, 476; 16 U. S. C., sec. 683, constituted an acceptance of such jurisdiction by the Federal Government. However, it is plain from the language of the 1916 Act (Appendix pp. 11–12, *infra*) and from its legislative history (53 Cong. Rec. 10327) that the United States did accept the grant. Moreover, the Circuit Court of Appeals also held (R. 314) that acceptance of such a grant is presumed. This holding is correct (*Fort*

*Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 528; *Mason Co.* v. *Tax Comm'n.,* 302 U. S. 186, 207), and petitioners do not appear to attack it.

It is now urged that there is nothing to show that the size of the deer herd could not have been reduced "by means and within the time allowed by State law" and that the United States should not be permitted to ship live deer outside of North Carolina "in the absence of proof that they could not" be turned over to state game officials "to stock other remote areas in the State" (Pet. 14–15, 19–20, 24). However, petitioners did not advance these arguments in the court below and it is clear from what has already been said that they are without merit.

CONCLUSION

The decision of the circuit court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
*Solicitor General.*

DECEMBER 1940.